United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2004,2041

To be argued by
LAWRENCE S. FELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-2004 and 74-2041

UNITED STATES OF AMERICA,

Appellee,

—v.—

BEN J. SLUTSKY and JULIUS SLUTSKY,
d/b/a "The Nevele",

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES COURT OF APPEALS
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Preliminary Statement

Ben J. Slutsky and Julius Slutsky appeal from orders entered on July 24, 1974, in the United States District Court for the Southern District of New York by the Honorable Lloyd F. MacMahon, United States District Judge, denying without a hearing appellants' motion for a new trial pursuant to Rule 33, Fed. R. Crim. P. and motion for reduction of their sentences pursuant to Rule 35, Fed. R. Crim. P.

Indictment 72 Cr. 1235 was filed on November 2, 1972 in nine counts. Count 1 charged Julius Slutsky and Counts 2 and 3 charged Ben Slutsky with signing and filing false partnership income returns for the Nevele, a resort hotel and country club in Ellenville, New York, covering the years, 1965, 1966 and 1967 in violation of Title 26, United States Code, Section 7206(1). The Nevele was owned by

the Slutskys as equal partners. Counts 4, 5 and 6 charged defendant Julius Slutsky with attempted evasion of his personal income tax for the years 1965, 1966 and 1967, respectively, in violation of Title 26, United States Code, Section 7201. Counts 7, 8 and 9 charged defendant Ben J. Slutsky with attempted evasion of his personal income tax for the years 1965, 1966 and 1967, respectively, in violation of Title 26, United States Code, Section 7201.

After a 6 day trial before Judge MacMahon and a jury, the defendants were found guilty on each count in which they were named.

On March 19, 1973 Judge MacMahon imposed the following sentences: Ben J. Slutsky—three years imprisonment and a fine of $5,000 on each of Counts 2 and 3, and five years imprisonment and a fine of $10,000 on each of Counts 7, 8 and 9, the prison sentences to run concurrently but the fines to be cumulative for a total of $40,000; Julius Slutsky—three years imprisonment and a fine of $5,000 on Count 1 and five years imprisonment and a fine of $10,000 on each of Counts 4, 5 and 6, the prison sentences to run concurrently but the fines to be cumulative for a total of $35,000. The costs of prosecution also were imposed on each appellant.*

On September 24, 1973 this Court affirmed the conviction of both appellants on the attempted personal income tax evasion counts, but reversed and vacated the judgments of conviction and sentences imposed on the false filing counts. 487 F.2d 832 (2d Cir. 1973). The net result of that decision was that each appellant had an effective sentence of five years imprisonment and a $30,000 fine. On April 15, 1974 the United States Supreme Court denied appellants' petition for a writ of certiorari. 42 U.S.L.W. 3584. Their petition for rehearing was denied on May 13, 1974. 42 U.S.L.W. 3632.

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* Both appellants were sentenced under the parole provisions of Title 18, United States Code, Section 4208(a)(2).

On May 17, 1974 appellants moved in the District Court, pursuant to Rule 33, Fed. R. Crim. P., for a new trial, or, in the alternative, for a hearing to determine the issues relating to that motion. The motion in all respects was denied in an endorsement filed on July 18, 1974. The District Court filed its memorandum opinion on July 24, 1974.

On July 22, 1974 appellants filed a motion dated May 28, 1974 requesting the District Court to reduce their sentences pursuant to Rule 35 of the Federal Rules of Criminal Procedure. The motion was denied in an endorsement filed on July 26, 1974.

Appellants' application for bail pending appeal was denied by this Court on July 25, 1974. Both appellants are presently serving their sentences.

Statement of Facts

1. Motion for a New Trial

The Government's evidence at trial established that the defendants omitted from their taxable income for the years 1965, 1966 and 1967 a total of $1,232,000 on which they failed to pay income taxes totalling over $750,000. The proof consisted of a "bank deposit" analysis of five checking accounts and one savings account which established that the defendants derived substantial income from the operation of their hotel which was not reported on their personal income tax returns.

In their motion for a new trial appellants claimed that they had discovered that of the $8.5 million in checks in amounts under $1,000 deposited during the three year period in the Nevele checking accounts at the First National Bank & Trust Company of Ellenville and the Ellenville National Bank, $1,888,000 consisted of payroll and other checks which

had been cashed for Nevele employees and guests by the hotel using cash from non-income sources, namely three other enterprises (Nevele Acres, Golden-Gate Olcott and the Sunspa) owned by appellants during that period. These companies allegedly issued checks payable to Ben and Julius Slutsky, who cashed them and used the currency obtained to meet the Nevele's payroll check cashing requirements.

The moving papers, as well as the evidence at trial, revealed, however, that appellants were aware of the existence of this evidence at the time of trial. Samuel Levis, accountant for the Nevele, testified at trial that $15,000-$18,000 per week was kept on hand at the hotel to cash payroll and other checks, during the years in question. According to Levis, the currency used to cash the Nevele's employee's payroll checks came from "checks [that] were cashed for that particular purpose or from guest income." (Tr. 124, 178-79).* "Yet, defendants made no attempt at trial to attribute those funds to non-income sources, despite the obvious importance of such evidence." (A. 73).

Appellants claimed that they had been told by Ben Slutsky's trial counsel that the Government had no case against them and that therefore they were not made aware of the importance of the payroll cashing operation at the Nevele. The District Court, however, rejected as incredible this explanation for the defendants' failure to enlighten their trial counsel about the alleged non-income source of the funds used to cash the payroll checks:

> "Since the defendants themselves were the payees on checks issued by their own enterprises and cashed those checks on a regular basis, they surely knew of the Nevele's practice of cashing payroll checks at the

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* "Tr." refers to the transcript of the trial; "Br." refers to appellants' brief; references preceded by the letter "A." are to appellants' appendix.

> time of trial. It surpasses belief to think that experienced businessmen, like the Slutskys, would not deem the check-cashing practice, involving at it did large sums of money, sufficiently important to bring it to the attention of their counsel.
>
> * * *
>
> "The information involved here was, without a doubt, known to the defendants at trial, and their contention that they were ignorant of its importance is simply not credible." (A. 74-75).

The moving papers made no attempt to show by affidavit or documentary evidence that *any* of the currency used to cash a single payroll check came from the Slutskys' other enterprises and that the money was not income.* Appellants admitted that those enterprises had more than $2 million in income during 1965-67, but completely failed to show that the funds used to cash checks at the Nevele were not part of that income.

The second aspect of appellants' claim of newly discovered evidence related to a report prepared by the accounting firm of Haskins & Sells which purported to show that the Government had failed to credit appellants with $470,975 in non-income items recorded on the books and records of the Nevele. The Haskins & Sells report explicitly stated that the amounts presented therein had not been audited or verified by that firm and that the firm did not express any opinion on them (A. 58).

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* While the moving papers included affidavits from Ben and Julius Slutsky, neither of these affidavits referred to the cashing of payroll checks or the allegation that the cash used therefor came from their other enterprises and was not income. Appellants relied exclusively on vague and undocumented hearsay statements of counsel set forth in "affirmations" not under oath to support this branch of the motion.

The record establishes that the Haskins & Sells report was inaccurate and misleading in at least two important respects. First, while the report states that guest income returns for 1965 ($21,802.60) and 1966 ($25,632.50) were not eliminated by the Government as a non-income item, Government Exhibit 127 plainly shows that these items, totalling, $47,436 were in fact eliminated. See 487 F.2d at 841 n.11. The report also ignored the fact that the Government credited the appellants with an additional $189,879 in non-income deposits based upon representations made by trial counsel to members of the Department of Justice at a conference on January 12, 1972. These facts were stipulated at trial and reflected on Government Exhibit 127. *Id.* Thus, the total of the guest returns of $47,436 and the $189,879 in "leads" increased the total non-income items discovered in the Nevele's books during the audit by $237,315. Accordingly, at the very least, the Haskins & Sells figure of $470,975 should have been reduced by $237,315 to accurately reflect the full amount of eliminations with which the Government credited appellants at trial. Even assuming *arguendo* that the unverified and unaudited amounts contained in the report represent non-income items, the balance of $233,360 would not reduce the $1,232,000 in unreported income proven at trial by an amount which probably would have resulted in a verdict of acquittal.*

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* To the extent, if any, that there were non-income items reflected on the Nevele's books and records which the Government failed to consider, the omission was directly attributable to appellants' refusal to permit inspection of those books and records. However, Nathan Frankel, the accountant whom the Slutsky's retained after the IRS investigation commenced, and his staff of eight had access to these books and records for two years. Frankel performed an analysis which, as he testified at trial, extracted all the non-income items reflected on the books made available to him. Furthermore, the Government's allowance for non-income deposits exceeded the amount computed by Frankel by $63,000 even though his figures were based on an examination of the books and records to which the Government had been denied access (A. 67-68).

Appellants also claimed that they were entitled to a new trial on the ground of ineffective representation of counsel based upon trial counsel's failure to order a complete audit of unidentified deposits in the Nevele's business checking accounts.

At the trial Ben Slutsky was represented by Louis Bender, Esq.; Julius Slutsky was represented by Moses Kove, Esq.* No claim of inadequacy was alleged on Mr. Kove's part even though his defense of Julius Slutsky did not differ in any material was from that offered by Mr. Bender.

The record indicates that the decision not to conduct a comprehensive audit of the bank accounts was the product of Mr. Bender's considered, experienced judgment and was calculated to serve the interest of his client. Judge MacMahon found there was no basis for the claim:

> "At most, counsel's decision not to conduct a complete audit of the unidentified deposits (which apparently could have been identified for him by his clients) was a matter of trial strategy, which our Court of Appeals has warned 'is not to be ignored.' *United States* v. *West*, 494 F.2d 1314 (2d Cir. 1974). As the Government points out, counsel argued unsuccessfully, both at trial and on appeal, that the unidentified deposits were not income. Moreover, his decision not to order a full audit was not unreasonable in light of his clients' inexplicable failure to inform him that the checks involved were (allegedly) cashed by the Nevele using non-income funds" (A. 76-77).

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* Both Mr. Bender and Mr. Kove are able and experienced criminal lawyers of proven competence. Mr. Bender's reputation as a leading specialist in criminal tax cases is well known (A. 68).

2. Motion for Reduction of Sentence

In support of the motion for reduction of their sentences, appellants made the following arguments: (1) Ben Slutsky was ill and had been hospitalized for hepatitis on four occasions since sentence had been imposed; (2) appellants' extensive philanthropy had not been brought to the attention of the District Court before sentencing; (3) the sentences were more severe than those imposed in certain other cases involving similar or more serious offenses; (4) persons sentenced pursuant to 18 U.S.C. § 4208(a)(2) allegedly serve the same amount of time in prison as those who receive "regular" sentences and hence the District Court allegedly labored under a mistake of fact when it imposed the sentence under Section 4208(a)(2).

Judge MacMahon denied the motion on the ground that the defendants had failed to present any "facts or law not fully considered by the court at the time of the imposition of their five-year sentences in March 1973, pursuant to 18 U.S.C. § 4208(a)(2)" (A. 192).

ARGUMENT

POINT I

The District Court properly exercised its discretion in denying appellants' motion to reduce their sentences.

The purpose of a motion under Rule 35 of the Federal Rules of Criminal Procedure was explained by this Court in *United States* v. *Ellenbogen*, 390 F.2d 537, 543 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968) as follows:

> "The motion to reduce a sentence is 'essentially a plea for leniency,' . . . Rule 35 is intended to give every convicted defendant a second round before the

> sentencing judge, and at the same time, it affords the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim."

The motion is addressed to the sound discretion of the District Court,* and that Court's disposition of the motion is not reviewable on appeal upon a showing that there was clear and gross abuse of discretion. *United States* v. *Stumpf,* 476 F.2d 945 (4th Cir. 1973); *Taylor* v. *United States,* 456 F.2d 1101 (5th Cir.), *cert. denied,* 409 U.S. 856 (1972); *United States* v. *Kreuger,* 454 F.2d 1154 (9th Cir. 1972); *United States* v. *Jones,* 444 F.2d 89 (2d Cir. 1971).

Judge MacMahon considered appellants' arguments in support of their request for leniency and found them insufficient to warrant reduction of their sentences. *Cf. McGee* v. *United States,* 462 F.2d 243, 247 n. 8 (2d Cir. 1972). He concluded that appellants had shown "no facts or law not fully considered by the court at the time of the imposition of their . . . sentences . . ." (A. 192). On this appeal, appellants have utterly failed to demonstrate *any* abuse of discretion by the District Court in denying their motion. In the absence of such a showing, this Court may not substitute its judgment for that of the District Court. *See United States* v. *Kreuger,* 454 F.2d 1154, 1155 (9th Cir. 1972).

The principal argument advanced by appellants is that in imposing the original sentences Judge MacMahon labored under a serious mistake of fact concerning the effect of a sentence under Section 4208(a)(2). According to appellants, Judge MacMahon "expected that they could, and perhaps would, receive an early parole" under the provisions

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* There is no requirement that the District Court hold a hearing. *United States* v. *Jones,* 490 F.2d 207 (6th Cir. 1974); *United States* v. *Maynard,* 485 F.2d 247 (9th Cir. 1973).

of Section 4208(a)(2). The "critical mistake of fact" lies in the contention that he "did not know that in fact the appellants would be forced to remain in prison for a *longer* period of time than if he had imposed a 'regular' five year sentence." (Br. at 26).

This argument is not persuasive. The statistics cited by appellants (Br. at 27) showing that the "average" sentence under Section 4208(a)(2) is slightly higher than the "average" "regular sentence" are hardly an adequate basis upon which a reliable prediction can be made as to how much time appellants will actually serve in prison or that the Board of Parole in this case will refuse to consider appellants' performances in deciding whether to grant them an early release from prison.*

To remedy the lack of probative value of these statistics, appellants for the first time on this appeal assert that under new guidelines promulgated by the Board of Parole, "they will not be eligible for release until they have served between 20 and 26 months in prison", whereas under a straight five-year sentence, they would have been eligible for parole after serving 20 months (Br. at 31).

This argument, as noted, was not presented to the District Court. Furthermore, it is based upon factual assertions outside the record.** Notwithstanding appellants' assertion to the contrary, the new guidelines for parole release consideration specifically refer to sentences under Section 4208(a)(2), *see* § 2.3 [39 Fed. Reg. 20028 (June 5, 1974)], and explicitly state in § 2.20 that:

> "(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the

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* Appellants have been incarcerated since July 26, 1974, a period of only two months.

** *E.g.* "[W]e are told" that any income tax evasion case involving an amount over $100,000 is classified as a "very high" offense (Br. at 31).

> guidelines (either above or below) may be rendered. For example, cases with exceptionally good institutional program achievement may be considered for earlier release." (39 Fed. Reg. 20030).

The argument based upon the new parole guidelines is as unimpressive and insubstantial as the one based upon the statistical comparison between the average length of time actually served under "regular" sentences and that served under Section 4208(a)(2) sentences.*

It is far from clear that in imposing the sentences under Section 4208(a)(2), Judge MacMahon intended release from prison at the earliest possible moment. On the contrary, his statement at the time of sentencing (A. 188-189) strongly suggests that he believed that appellants should serve substantial prison terms. The denial of the Rule 35 motion echoed his earlier condemnation of appellants' "massive tax fraud" (A. 192) and is convincing evidence that it was not his purpose to minimize the amount of time that appellants would spend in prison **

In any event, the thrust of appellants' complaint is aimed at the Board of Parole and its alleged practices. The remedy for this claimed grievance is not to be found in

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* If appellants truly believed that they would be better off with a "regular" sentence, they could have requested that their sentences be so modified. There would have been no objection by the Government to such an application, but none was made. Appellants' discontent stems not from Section 4208(a)(2) or even from their purely speculative forecast as to when the Board of Parole will decide their parole eligibility, but rather from their original dissatisfaction with any five-year sentence, irrespective of the statutory provision under which it might be imposed.

** Had Judge MacMahon been inclined toward early parole, he could have sentenced appellants under Section 4208(a)(1) and recommended that parole be favorably considered at an early specified period. Instead, he chose to leave the timing of parole to the discretion of the Board of Parole.

Rule 35. Rather it lies in an independent civil action against the Board of Parole after appellants' administrative remedies have been properly exhausted. *Cf. United States* v. *Huguet*, 481 F.2d 888, 892 (2d Cir. 1973); *O'Neill* v. *United States*, 315 F. Supp. 1352, 1354 (D. Minn. 1970), *aff'd*, 438 F.2d 1236 (8th Cir. 1971). For example, *Grasso* v. *Norton*, 371 F. Supp. 171, 376 F. Supp. 116 (D. Conn. 1974), so heavily and inappropriately relied on by appellants, was not a request for a reduction of sentence under Rule 35, but was a petition filed against the Warden of the Federal Correctional Institution at Danbury, Connecticut and others for a writ of habeas corpus under 28 U.S.C. § 2241 and initiated after petitioner had exhausted his administrative remedies. 371 F. Supp. at 172. These steps have not been followed here.

Finally, appellants argue that their sentences should be invalidated because the District Court employed a "fixed and mechanical approach" to sentencing. Appellants, however, offer nothing to support this contention, and Judge MacMahon's statements at the time of sentencing (A. 188-89) indicate that, far from being "mechanical," * the sen-

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* A sentence is imposed in a mechanical manner where the record indicates that the judge has a fixed sentencing policy based on the type of crime involved or a specific class of persons, and does not make "a careful appraisal of the variable components relevant to the sentence upon an individual basis." *United States* v. *Schwarz*, Dkt. No. 74-1455 at 4964 (2d Cir., July 23, 1974); *see Woolsey* v. *United States*, 478 F.2d 139 (8th Cir. 1973); *United States* v. *McKinney*, 466 F.2d 1403 (6th Cir. 1972); *United States* v. *Daniels*, 446 F.2d 967 (6th Cir. 1971). A sentence may also be vacated if it is based at least in part on improper criteria, *see Thomas* v. *United States*, 368 F.2d 941 (5th Cir. 1966); if the sentencing judge refuses to consider relevant available information concerning the defendant, *see Leach* v. *United States*, 334 F.2d 945 (D.C. Cir. 1964); or if the sentencing judge acts in a manner that amounts to an abuse of discretion. *See United States* v. *Brown*, 470 F.2d 285 (2d Cir. 1972). Appellants have offered nothing to show that any of those situations were present in the instant case.

tences were the product of an informed and carefully exercised discretion.*

If appellants' claim is that the Board of Parole will act mechanically in connection with their parole and not in accordance with its responsibilities under the law, their remedy, as previously suggested, is an action against the Board of Parole.

POINT II

The rule prohibiting appellate review of sentences should not be invalidated.

Appellants ask this Court to discard the principle against appellate review of sentences,** which has been long-recognized by this and other federal appellate courts. *See, e.g., United States* v. *Tucker,* 404 U.S. 443, 447 (1972); *Gore* v. *United States,* 357 U.S. 386, 393 (1958); *Townsend* v. *Burke,*

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* In denying the Rule 35 motion, the District Judge emphasized that: "At the time of sentence, this court had the benefit of a very comprehensive presentence report, numerous letters from defendants' friends attesting to their virtues, and full exposition by defense counsel of all facts in mitigation of punishment" (A 153).

** Even if appellate review of sentences were deemed permissible and advisable, such review could only be sought on direct appeal from a judgment of conviction and not on an appeal from a denial of a Rule 35 motion to reduce a sentence. In the latter situation, the court of appeals may only determine if the district court committed a clear and gross abuse of its discretion, *i.e.,* acted in an impermissible manner in denying the motion. *United States* v. *Stumpf,* 476 F.2d 945 (4th Cir. 1973); *Taylor* v. *United States,* 456 F.2d 1101 (5th Cir.), *cert. denied,* 409 U.S. 856 (1972); *United States* v. *Krueger,* 454 F.2d 1154 (9th Cir. 1972); *United States* v. *Jones,* 444 F.2d 89 (2d Cir. 1971). "[A]n appellate court has no authority either to reduce or modify a sentence or order the trial judge to do it on an appeal from a denial of a motion under Rule 35." *Bryson* v. *United States,* 265 F.2d 9, 14 (9th Cir.), *cert. denied,* 360 U.S. 919 (1959).

334 U.S. 736, 741 (1948); *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932); *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States* v. *Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973); *United States* v. *Holder*, 412 F.2d 212, 214-15 (2d Cir. 1969); *United States* v. *Piccioli*, 352 F.2d 856, 860 (2d Cir. 1965), *vacated on other grounds*, 390 U.S. 202 (1968). The United States Supreme Court recently reaffirmed its approval of the non-reviewability of sentences. *Dorszynski* v. *United States*, 94 S. Ct. 3042, 3047, 3051-52 (1974). This Court is, of course, bound by *Dorszynski* and other Supreme Court decisions—if not its own precedents—to follow the principle of non-reviewability of sentences. *See Williamson* v. *United States*, 332 F.2d 123, 134-35 (5th Cir. 1964); *Tomlinson* v. *Miles*, 316 F.2d 710, 714-15 (5th Cir.), *cert. denied*, 375 U.S. 828 (1963); *United States* v. *O'Connor*, 237 F.2d 466, 471 (2d Cir. 1956). Alteration of the rule would require Supreme Court action or congressional legislation.* *See United States* v. *Wilson*, 450 F.2d 495, 498 (4th Cir. 1971); *cf. Dorszynski* v. *United States*, 94 S. Ct. 3042, 3051-52 (1974); *Gore* v. *United States*, 357 U.S. 386, 393 (1958).**

In any event, appellate review of sentences would flood the already overflowing dockets of the courts of appeals. Once appellate review of sentences is permitted, there is no

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* Because substantial additional funds would be necessary for expanded judicial and administrative resources to handle appeals seeking review of sentences, Congressional approval of such a radical change would be both necessary and advisable. In 1967 the Senate passed a bill providing for appellate review of sentences [S. 1540, 90th Cong., 1st Sess. (1967)], and a similar bill was introduced in the Senate last year, S. 716, 93rd Cong., 1st Sess. (1973).

** Cases cited by appellants purportedly approving appellate review of sentences do not so hold. Rather than reviewing the sentences imposed by the district courts, those cases found the manner in which the sentences were imposed to be improper. As pointed out in Point I, appellants have not shown anything to indicate that the manner in which Judge MacMahon imposed their sentences or declined to reduce them was improper.

principled basis upon which review may be allowed to defendants whose sentences were imposed upon convictions after trial, but denied to those whose sentences were imposed upon pleas of guilty or *nolo contendere*.* That being so, the increase in the number of appeals engendered by the adoption of appellate review of sentences would be overwhelming. *See* H. Friendly, *Federal Jurisdiction: A General View* 36-37 (1973); Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 578 (1969).

Furthermore, as Judge Friendly has cogently argued, there are better methods of ameliorating the problem that appellate review of sentencing is primarily intended to cure—disparate sentences—without paralyzing the Court of Appeals:

> I do not mean by this to minimize the problem of disparate or excessive sentences, but rather to indicate that the solution does not lie in imposing still another burden on the courts of appeals. Appellate judges are ill equipped for the task, and there would be almost as much danger of disparity among panels of a court of appeals as there is among district judges. A far better solution is the creation in each circuit of a standing sentence review panel of district judges chosen because of their special interest in sentencing and with ready recourse to penologists, psychiatrists and sociologists who could aid them in their work. This would achieve a circuit-wide uniformity, at least at any one time, which shifting

* Indeed, such a distinction would arguably deny the latter group of defendants the equal protection of the laws under the Fifth Amendment of the United States Constitution. *Cf. Rinaldi* v. *Yeager*, 384 U.S. 305, 310-11 (1966); *United States ex. rel. Diblin* v. *Follette*, 418 F.2d 408, 410 (2d Cir. 1969). In addition, it would almost certainly discourage defendants from pleading guilty.

> panels of circuit judges would not. Such a system would have the further advantage of divorcing the sentencing problem from review on the merits, with the attendant danger of trade-offs. In any event, whatever the desiderata may be, the courts of appeals simply cannot take on this added task. H. Friendly, *Federal Jurisdiction: A General View* 37 (1973) (footnotes omitted).

Finally, whatever may be said in favor of appellate review of sentences, "this case would be a most inappropriate vehicle for judicial creativity with respect to review of sentences." *United States* v. *Velazquez, supra,* 482 F.2d at 141.

The appellants were convicted of failing to report income of more than $1.2 million over a three-year period. This gargantuan fraud permitted Julius Slutsky to avoid paying taxes in the sum of $369,136.83 and Ben Slutsky in the sum of $391,945.19. In a tax evasion case of this magnitude, committed by mature and wealthy men who were motivated by no apparent reason other than inordinate greed, the punishment meted out was appropriate. The terms of imprisonment imposed are especially warranted since, as Judge MacMahon pointed out at the time of sentence, the maximum fines allowed by the law are insignificant when compared with the amount of tax evasion in this case. While appellants attack their sentences by comparing them with sentences in other cases, they cite no case of income tax evasion of comparable dimension to this one. Had consecutive sentences been imposed, as they could have been, appellants could have received up to a maximum of 15 years imprisonment under the three tax evasion counts. Moreover, if the sentences here are just—and in light of all the circumstances they are—the sentences imposed in other cases are, at most, of marginal relevance. Just sentences are not made less so because of unjustifiably lenient sentences in other cases.

In sum, appellants' sentences, far from being unduly harsh, are commensurate with their crimes, are within the statutory limits and were imposed in a lawful manner. They may not and should not be disturbed on appeal.

POINT III

The District Court properly denied the motion for a new trial without a hearing.

The narrow issue raised on this appeal concerning the denial of the Rule 33 motion is whether appellants were entitled to a hearing before the motion was decided. The record fully supports the District Court's conclusion that appellants "utterly failed to make even a factual showing which would justify holding a hearing on their 'new evidence' claim" (A. 75).

It is undisputed that motions for a new trial based on newly discovered evidence "are not held in great favor," *United States* v. *Catalano,* 491 F.2d 268, 274 (2d Cir. 1974) and "should be granted only with great caution." *United States* v. *Costello,* 255 F.2d 876, 879 (2d Cir.), *cert. denied,* 357 U.S. 937 (1958). The burden of proof rests on the movant to show that a new trial should be granted or that a hearing be conducted. *United States* v. *Franzese,* 321 F. Supp. 993 (E.D.N.Y. 1970), *aff'd,* 438 F.2d 536 (2d Cir.), *cert. denied,* 402 U.S. 995 (1971). Where the motion for a new trial is based on a claim of newly discovered evidence, the movant has a heavier burden than in other motions for a new trial. *United States* v. *Rachal,* 473 F.2d 1338, 1343 (5th Cir.), *cert. denied,* 412 U.S. 927 (1973); *Brodie* v. *United States,* 295 F.2d 157 (D.C. Cir. 1961).

The established test for determining whether a new trial should be granted based upon a claim of newly discovered evidence is derived from *Berry* v. *State,* 10 Ga. 511, 527

(1851). In *United States* v. *Costello, supra,* 255 F.2d at 879 the Second Circuit, quoting *Berry,* stated the six fold requirement as follows:

> "1st. That the evidence has come to [defendant's] knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only—viz.: speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character of a witness."

None of the alleged items of new evidence offered by appellants satisfied the first two requirements, that is, that the evidence was unknown to them at the time of trial and that the failure to learn of the evidence was due to no lack of diligence on their part.*

Here the moving papers on their face established that all of the allegedly newly discovered evidence was contained in books, records and documents exclusively within appellants' possession and control before and during the trial and that both appellants personally had been involved in the alleged transactions which form the basis for their claim. Under these circumstances appellants failed to satisfy their burden of showing "that the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or, at the latest, at the trial." *United States* v. *Costello, supra,* 255 F.2d at 879; *United States* v. *Rachal, supra,* 473 F.2d at 1344; *United States* v. *Marachowsky,* 213 F.2d 235, 239 (7th Cir.), *cert. denied,* 348 U.S. 826 (1954).

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* The evidence from the Haskins & Sells report also failed to satisfy the third criterion.

The words of the late Judge Herlands in *United States* v. *Sobleu*, 203 F. Supp. 542, 565 (S.D.N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962), might well have been written about the Slutskys' alleged new evidence:

> "Where the allegedly newly discovered evidence was known to the defense or readily obtainable by it before or during the trial and the defense trial strategy was not to utilize such known or obtainable evidence during the trial, the decision by the defense to change its strategy after an unfavorable verdict does not render the evidence 'newly discovered'."

In order to justify holding a hearing, appellants had the burden of demonstrating affirmatively that they could not with due diligence have uncovered the missing evidence before or at, the latest, the trial. *United States* v. *Birrell*, 482 F.2d 890 (2d Cir. 1973); *United States* v. *Pellegrino*, 470 F.2d 1205, 1209 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973); *United States* v. *Edwards*, 366 F.2d 853, 873 (2d Cir. 1966), *cert. denied*, 386 U.S. 908 (1967); *United States* v. *Puco*, 338 F. Supp. 1252, 1255 (S.D.N.Y.), *aff'd*, 461 F.2d 846 (2d Cir. 1972); *United States* v. *Bradwell*, 295 F. Supp. 958, 961 (D. Conn. 1968); *United States* v. *Fassoulis*, 203 F. Supp. 114, 119-20 (S.D.N.Y. 1962). Judge MacMahon correctly found that no such showing had been made by appellants. Indeed, the record shows the contrary.

It is clear that a motion for a new trial based upon a claim of newly discovered evidence may be decided without a hearing. *United States* v. *Johnson*, 327 U.S. 106 (1946); *United States* v. *Catalano, supra; United States* v. *Troche*, 213 F.2d 401, 403 (2d Cir. 1954). *See also United States* v. *Persico*, 339 F. Supp. 1077, 1083 (E.D.N.Y.), *aff'd*, 467 F.2d 485 (2d Cir. 1972), *cert. denied*, 410 U.S. 946 (1973); 2 C.

Wright, *Federal Practice and Procedure* § 557 at 533 (1969). The denial of motion without a hearing was proper.

On this appeal the Slutskys challenge the factual findings made by the District Court in denying their motion. These factual determinations, however, are amply supported by the record and appellants have failed to sustain their burden of demonstrating that they are "wholly unsupported by evidence." *United States* v. *Johnson,* 327 U.S. 106, 111-112 (1946); *United States* v. *Silverman,* 430 F.2d 106, 119-20 (2d Cir. 1970), *cert. denied,* 402 U.S. 953 (1971).

Appellants claim that "it is undisputed that the evidence was discovered after trial . . ." (Br. at 46). While that may be true insofar as appellants' new counsel is concerned, it is totally inaccurate insofar as the Slutskys themselves are concerned, as the District Court correctly found (A. 74).

Appellants next challenge the finding that they completely failed to show that the cash allegedly obtained by the Slutskys from their other enterprises was not part of the income of those enterprises, which admittedly exceeded $2 million during 1965 through 1967. It is argued that regardless of whether or not these funds were income earned by these other enterprises, they would not be income to the appellants (Br. 46, n. **). This argument totally lacks merit.

There has never been any claim by appellants that the money allegedly transferred from the Nevele Acres, Golden-Gate Olcott and the Sunspa resulted from a withdrawal of capital from or a sale of the assets of those enterprises. Indeed, the Slutskys even now do not deny that this money was income earned by these businesses. Assuming *arguendo* that in fact the currency used to cash payroll checks came from these other enterprises, appellants admittedly owned these concerns and any income they earned was includable

as part of the Slutskys' taxable income and reportable on their individual income tax returns during the years in question. The income character of these funds did not disappear merely because they were allegedly used by appellants to cash payroll checks at the Nevele. Whether or not the original source of the income was these other concerns which they owned, the fact remains that the Slutskys failed to report this income on their individual income tax returns.

Appellants argue that Judge MacMahon "misconstrued" the import of Levis' testimony concerning the cashing of payroll checks which they say "in no way related to the advances of close to one million dollars made by other enterprises to the Nevele . . ." (Br. at 47). Levis testified that $15,000-$18,000 per week was kept at the Nevele to cash payroll checks issued to the hotel's 300 employees (A. 63). Over a three-year period this would amount to more than $2 million in cash used for this purpose. Moreover, Levis testified that this cash came from "checks that [were] cashed for that particular purpose or from guest income" (A. 63). Since appellants contend that currency received from guests in payment for their bills was rarely used to cash payroll checks (A. 22-23), the bulk of the more than $2 million used to cash the payroll checks must have come from checks cashed for that purpose.

The significance of Levis's testimony is unmistakable and was correctly interpreted by the District Court. His testimony clearly established that the practice of cashing payroll checks was known to the appellants at trial and that their failure to attribute the funds used to cash the payroll checks to a non-income source, despite the obvious importance of this testimony, amounted to a lack of due diligence on their part to present the missing evidence at trial.

Apart from the deficiencies already recited, the papers submitted in support of the new trial motion, though lengthy, made no attempt by documentary evidence or affi-

davit to show that *any* of the currency used to cash a *single* payroll check came from any of the Slutskys' other enterprises and that the money was not income earned by those enterprises. Instead, the District Court was requested to hold a hearing based upon three pages of sketchy, hearsay statements of counsel (A. 25-27), set forth in "affirmations" and not under oath, that such proof existed. The "lack of persuasiveness and solidity" of the supporting papers was a sufficient basis upon which to deny the motion and cannot be disturbed on this appeal. *United States* v. *Silverman*, *supra*, 430 F.2d at 120. The allegations concerning the nature of the newly discovered evidence were so vague, generalized and undocumented that they failed to raise *any* issue of fact requiring an evidentiary hearing. *See Wilke* v. *United States*, 422 F.2d 1298, 1299 n. 1 (9th Cir. 1970).

Taylor v. *United States*, 487 F.2d 307 (2d Cir. 1973) does not require, as appellants contend, that a hearing have been conducted. The issue in *Taylor* was whether an application for relief under 28 U.S.C. § 2255 had been properly denied without a hearing where the moving papers contained a supporting affidavit by an indicted co-defendant stating that she had been promised special favors in exchange for her testimony, which allegations were denied in an affidavit by an Assistant United States Attorney. This Court held that a hearing should have been ordered, since "a sufficient affidavit" had been presented to support the petition and the Government's opposing affidavit was not part of "the files and records of the case" which could be taken "conclusively to show that the prisoner is entitled to no relief" under 28 U.S.C. § 2255. 487 F.2d at 308. By contrast, in this case, there was *no sufficient affidavit* submitted in support of the allegations of newly discovered evidence; indeed, there was no affidavit at all to support this branch of the motion.

Far from being "unpardonable" (Br. at 49), the decision to deny the motion without a hearing was eminently correct and completely justified.

CONCLUSION

The orders of the District Court denying the motion for reduction of sentence and denying the motion for a new trial without a hearing should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

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) ss.:
COUNTY OF NEW YORK)

LAWRENCE S. FELD, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of September, 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Lawrence S. Feld

Sworn to before me this

27th day of September, 1974

Janeta Ann Grayeb

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